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No. 98-167

In The

Supreme Court of the United States

October Term, 1998

ARIZONANS FOR OFFICIAL ENGLISH AND ROBERT D. PARK,

Petitioners,

v.

STATE OF ARIZONA; JANE DEE HULL, Governor of Arizona; GRANT WOODS, Attorney General of Arizona; LINDA AGUIRRE; JOHN PHILLIP EVANS; ROSIE GARCIA; JOE EDDIE LOPEZ; CANDIDO MERCADO; PETER RIOS, JR.; ARMANDO RUIZ; MACARIO SALDATE IV; FEDERICO SANCHEZ; and VICTOR SOLTERO,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Arizona

BRIEF IN OPPOSITION OF RESPONDENTS AGUIRRE, EVANS, GARCIA, LOPEZ, MERCADO, RIOS, RUIZ, SALDATE, SANCHEZ AND SOLTERO

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QUESTION PRESENTED

1. Does a state law proscribing all state elected officials and state employees from communicating with their constituents and members of the public in languages other than English "during the performance of government business" violate the First and Fourteenth Amendments?

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INTRODUCTION

Pursuant to this Court's request that respondents respond to the Petition for Certiorari filed by Arizonans for Official English and Robert D. Park, respondents Aguirre, Evans, Garcia, Lopez, Mercado, Rios, Ruiz, Saldate, Sanchez, and Soltero respectfully request that the Petition be denied for the reasons set forth below.

REASONS FOR DENYING THE PETITION

Summary of Argument

Article 28 of the Arizona Constitution provides that "English is the language of the ballot, the public schools and *all* governmental functions *and* actions." Ariz. Const., Art. 28, § 1(2) (emphasis added). Article 28 applies to "the legislative, executive and judicial branches of government," and to "*all* political subdivisions, departments, agencies, organizations, instrumentalities, local governments and municipalities" of Arizona, including "*all* government officials and employees during the performance of government business." *Id.*, 1(3)(a)(iv) (emphasis added). Article 28 requires that "[t]his State and all political subdivisions of this State shall act in English and in no other language," and "prohibit[s] [t]his State from using or requiring the use of languages other than English. . . . " *Id.*, § 3(1)(a) (emphasis added). Based on this uniformly broad language, Article 28 is "by far the most restrictively worded official-English law to date." M. Arrington, Note, *English Only Laws and Direct Legislation: The Battle in the States Over Language Minority Rights*, 7 J.L. & Pol., 325, 327 (1991).[1]

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[1] *See also* D. Baron, *The English-Only Question* 21 ("[A]rticle 28 . . . is the most restrictive of the current wave of official-language laws. . . . ") (1990), and J. Crawford, *Hold Your Tongue* 176 (1992) ("Arizona's [Article 28 is] so far the most restrictive [Official English] measure").

Respondents are a group of Hispanic state elected officials and state employees who routinely communicate in Spanish with their constituents and members of the public "during the performance of government business." Respondents thus fall within the express prohibitions of Article 28. Many of respondents' constituents do not speak English well or at all. Article 28 would consequently prevent respondents from providing information to constituents and other members of the public that they are elected and employed to serve.

After the Governor of Arizona announced her intention to enforce Article 28, respondents challenged the constitutionality of Article 28 in the Maricopa County Superior Court seeking a declaration that Article 28 violated their rights under the free speech clause of the First Amendment and the equal protection clause of the Fourteenth Amendment.[2] Arizonans for Official English and its Chairperson Robert D. Park subsequently intervened as defendants in the litigation. In an unpublished memorandum decision, the Maricopa County Superior Court entered summary judgment in favor of the defendants. Respondents appealed the judgment to the Arizona Court of Appeals, and that court unanimously reversed the Superior Court. The defendants then appealed from the Court of Appeals judgment to the Arizona Supreme Court. In a unanimous decision, the Arizona Supreme Court affirmed judgment of the Court of Appeals and concluded that Article 28 violated the First and Fourteenth Amendments.

The State of Arizona, the Governor of Arizona, and the Attorney General of Arizona elected not to appeal from the Arizona Supreme Court's judgment. However,

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[2] Respondents sued the State of Arizona, the Governor of Arizona, and the Attorney General of Arizona under 42 U.S.C. § 1983 and the Arizona Declaratory Judgment Act, A.R.S. § 12-1831.

the intervening defendants – Arizonans for Official English and Robert D. Park – timely filed a Petition for a Writ of Certiorari to the Supreme Court of Arizona.[3]

Because Article 28 expressly forbids state elected officials (and their agents) from communicating with their constituents and members of the public in languages other than English "during the performance of government business," the Arizona Supreme Court concluded that Article 28 abridged "core" political speech in violation of the free speech clause of the First Amendment. Specifically, the Arizona Supreme Court reasoned that:

> [Article 28] violates the First Amendment by depriving elected officials and public employees of the ability to communicate with their constituents and with the public. With only a few exceptions, the Amendment prohibits all public officials and employees in Arizona from acting in a language other than English while performing government functions and policies. We do not prohibit government offices from adopting language rules for appropriate reasons. We hold that the Amendment goes too far because it effectively cuts off governmental communication with thousands of limited-English-proficient and non-English-speaking persons in Arizona, even when the officials and employees have the ability and desire to communicate in a language understandable to them. Meaningful communications in those cases is barred. Under such circumstances, prohibiting an elected or

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[3] Respondents agree with the State Respondents that petitioners lack standing to appeal the Arizona Supreme Court's judgement regarding Article 28 because petitioners' lack a *federally* cognizable interest in Article 28. *See generally State Respondents' Brief in Opposition to Petition for Writ of Certiorari* 6-12 (Nov. 16, 1998).

> appointed official or an employee from communicating with the public violates the employee's and the official's rights.

Ruiz v. Hull, 957 P.2d 984 (Ariz. 1998), *Petitioners' Appendix* 32a.[4] The Arizona Supreme Court also concluded that Article 28 violated the equal protection clause of the Fourteenth Amendment, reasoning that:

> By permanently implementing a linguistic barrier between persons and the government they have a right to petition, [Article 28] substantially burdens First Amendment rights. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961) ("The whole concept of representation depends upon the ability of the people to make their wishes known to their representatives"). Therefore, [Article 28] violates the Fourteenth Amendment's guarantees of equal protection because it impinges upon both the right to participate equally in the political process and the right to petition the government for redress.

Id. at 41a-42a. These conclusions reflect this Court's well-settled understanding of the First and Fourteenth Amendments. As this Court recognized in *New York Times v. Sullivan*, 376 U.S. 254, 266 (1963), the First Amendment was designed to "secure the widest possible dissemination of information from diverse and antagonistic sources." Article 28 threatened to circumscribe the dissemination of information by restricting the political speech of state elected officials. Moreover, because Article 28 would restrict the free speech rights of a specific class

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[4] Although both the State defendants and petitioners contested the construction of Article 28 ultimately adopted by the Arizona Supreme Court and contended that the scope of Article 28 was extremely narrow, this Court is bound by the Arizona Supreme Court's construction of Article 28. *See, e.g., Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993).

of speakers, it violates the equal protection principles applied by this Court in *Romer v. Evans*, 116 S.Ct. 1620 (1996).[5]

The Arizona Supreme Court was consequently correct in declaring Article 28 unconstitutional.[6] There is consequently no reason for this Court to consume its scarce resources on this dispute by means of granting certiorari.

A. Polylingualism and the Framers.

As this Court observed over one hundred years ago, [t]he Constitution of the United States . . . was made . . . for a people gathered and to be gathered from many nations and of *many tongues*. *Hurtado v. California*, 110 U.S. 516, 530-531 (1884) (emphasis added). Reflecting the enduring validity of this observation, the public and private uses of languages other than English have been a staple of every era of American history. Although English has always enjoyed linguistic primacy in the United

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[5] The Arizona Supreme Court carefully limited the scope of its opinion: "In making these rulings, we express no opinion concerning the constitutional validity of less restrictive English-only provisions discussed in this opinion. We also emphasize that nothing in this opinion compels any Arizona governmental entity to provide service in a language other than English." *Petitioners' Appendix* 7a.

[6] In addition to the Arizona Court of Appeals and the Arizona Supreme Court, three federal tribunals have declared Article 28 void as violative of the First Amendment: the United States District Court in *Yniguez v. Mofford*, 730 F. Supp. 309 (D. Ariz. 1990), a three judge panel of the Ninth Circuit in *Yniguez v. Arizonans for Official English*, 42 F.3d 1217 (9th Cir. 1994), and the Ninth Circuit sitting en banc in *Yniguez v. Arizonans for Official English*, 69 F.3d 920, *vacated on remand*, 118 F.3d 667 (9th Cir. 1997). Accordingly, petitioners have lost this case on five separate occasions.

States, this primacy has peacefully coexisted with extensive polylingualism in the private and the public spheres of American discourse. The American tradition of linguistic tolerance has both shaped and is a product of the principle of "the freedom of speech" guaranteed by the First Amendment.[7]

The polylingualism of the founding era is well-documented. *See generally* H. Kloss, *The American Bilingual Tradition* (1977). As Professor Norman Grado writes:

> The sounds of Africa, Europe, the Mediterranean, and the West Indies enriched the coastal air [of eighteenth-century America] as much as did the spices and aromas of various ethnic cuisines. . . . We tend to forget that passionate conversations about religion and politics, as well as family matters, were as likely to be thought through and spoken in vigorous German, French, Dutch, Yoruba, Gullah, Spanish, Swedish or Farsi. . . .

Norman S. Grado, "The Cultural Effects of the Revolution," in *The Blackwell Encyclopedia of the American Revolution* 579 (1994). Similarly, many Scottish, Welsh and Irish immigrants in Revolutionary America spoke Gaelic (and dialects thereof) and were unable to communicate in English. *See* B. Bailyn, *Voyagers to the West* 575-576 n.2 (1986), and R. Morris, *Witnesses at the Creation* 121 (1985). Georgia, New York, Maryland, Pennsylvania, Virginia, North Carolina, South Carolina, Florida, Alabama (then called "West Florida"), and Louisiana all had significant

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[7] When interpreting the First Amendment, this Court frequently considers the free speech traditions of the era when the Bill of Rights was drafted and ratified. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254, 273-277 (1964). As Professor Akhil Amar has demonstrated, the free speech traditions of the era in which the Fourteenth Amendment was drafted and ratified also inform First Amendment interpretation. *See* A. Amar, *The Bill of Rights* 137-294 (1998).

polylingual communities during the Revolutionary era, speaking Dutch, French, German, Gaelic, Greek, Italian, and Spanish. *See* B. Bailyn, *Voyagers to the West* 19, 25, 27, 455-461, 467, 478, 575-576 (1986).

In addition to languages native to Europe and the British Isles, over one thousand Native American languages were spoken in eighteenth-century America. *See* A. Josephy, *The Indian Heritage of America* 12-15 (1968). For example,

> [while t]raveling in New York in 1776, Joseph Bloomfield, then a captain in the Third New Jersey Regiment and later governor of New Jersey, heard spoken on a daily basis English, High Dutch, Low Dutch, French, Mohawk, Oneida, Seneca, Cayuga, Onondaga, and Tuscarora.

C. Calloway, *The American Revolution in Indian Country* 17 (1995). The prevalence of these indigenous tongues had a significant impact on the European settlers of early America; indigenous languages were so pervasive during the Revolutionary era that the European settlers "incorporated Algonkian, Iroquoian, and Muskhogean terms into their vocabulary." *Id.* Thus, like many other states, the Commonwealth Massachusetts is named after a Native American tribe.

African-Americans – who comprised approximately one fifth of the population of Revolutionary America – also spoke various African-related dialects. As Stephanie Grauman Wolf observes:

> The many languages of Africa were integrated with each other [in eighteenth-century America], as well as with English, to form the Creole languages distinctive in different parts of the southern colonies. We are familiar with the Gullah tongue of the islands of the eastern coast of South Carolina because it has survived into the twentieth century, but many contemporaries noticed Virginia blacks spoke a special "mixed dialect between Guinea and English," while a

> missionary in 1748 reported that blacks in the Chesapeake had "a language peculiar to themselves, a wild confused medley of Negro and corrupt English, which makes them very unintelligible except to those who have conversed with them for many years."

S. Wolf, *As Various as Their Land: The Everyday Lives of Eighteenth-Century Americans* 264 (1993).

Foreign language speech was not limited to the spoken word, and the foreign language press was active throughout the Revolutionary era. Benjamin Franklin published the first German language newspaper in America in 1732 – the *"Philadelphische Zeitung," see* K. Bartel, "German and the Germans at the Time of the American Revolution," 60 *Modern Language Journal* 98 (1976), and one of the most significant newspapers published during the Revolutionary era was the *"Wochentliche Pennslyvanische Staatsbote." See* B. Bailyn, *Voyagers To The West*, 62, 310, 402 (1986). Approximately thirty-eight different German-language newspapers were published in America between 1732 and 1800. *See* K. Conzen, "Germans," *Harvard Encyclopedia of American Ethnic Groups* 409 (1980). In fact, a father of the American free press – John Peter Zenger – was a "poorly educated German immigrant" who probably spoke more German than English, *see* L. Levy, *Emergence of a Free Press* 39, 52 (1985), and one of the first significant controversies in America regarding freedom of the press and the law of seditious libel involved a 1758 edition of the *Philadelphische Zeitung*. *See* J. Allen, *Printers and Press Freedom* 132-134 (1988).

Indeed, newspapers like *Der Philadelphishce Staatsbote* and the *Wochentliche Pennslyvanische Staatsbote* contributed to the public dialogue that culminated in the American Revolution and helped to establish the national identity essential to the Revolution's success. Professor W.P. Adams notes that:

> The German-language press played a major role in the political culture that sustained the transformation of colonial territories and provincial societies into an independent American nation-state. It helped create an enlightened, politically relevant public opinion that gave practical meaning to the central principles of enlightened politics, popular sovereignty and the accountability of the rulers to their electors. In doing so it also played an active role in the process of nation-building. It helped the German-speaking minority to feel part of and to function in a larger national whole. And it did all of this in ways that were not much different from the ways by which the English-language press all over the colonies helped integrate their diverse audiences into a national community.

W.P. Adams, "The Colonial German-language Press and the American Revolution," in *The Press and the American Revolution* 219 (B. Bailyn & J. Hench eds.) (1980). This conclusion is perhaps best illustrated by the fact that the *first* American newspaper to announce the promulgation of the Declaration of Independence was *Der Philadelphishce Staatsbote*. *Id.* at 152.

Government communications in the Revolutionary era reflected the linguistic diversity of the period. In the public sphere at the national level, the Continental Congress published various official documents in English, German, and French editions, including the Articles of Confederation and the famous 1774 Address to the people of Quebec lauding the relationship between a free press and self-government. *See generally*, J. Perea, "Demography and Distrust: An Essay on American Languages, Cultural Pluralism and Official English," 77 Minn. L. Rev. 269, 284-287 (1992). The Continental Congress also issued numerous other documents in German and French in connection with its successful efforts to recruit German and French troops. *Id.*

Official polylingualism was also common at the local level. "An estimated 10 percent of the pre-Revolutionary population was German-speaking, . . . [and Georgia's] population was so polyglot that a successful magistrate needed to speak fluently in at least three languages and preferably four. . . . " B. Bailyn, *The Peopling of British North America* 16-17 (1986). In eighteenth-century Pennsylvania, "[i]n legal action[s] and court proceedings . . . , documents in German were just as valid as those in English." W. Parsons, "Representation of Ethnicity Among Colonial Pennsylvania Germans," in *A Mixed Race: Ethnicity in Early America* 120 (F. Shuffelton ed. 1993). Under the leadership of Benjamin Franklin, petitions in German and English were distributed to be signed by the electorate and submitted by the Pennsylvania Assembly to the British Parliament requesting that the Penn proprietorship be abolished and replaced with a royal charter. *See* R. Middlekauff, *Benjamin Franklin and His Enemies* 87, 98-99 (1996).

Based on the unqualified language of the free speech clause and the pervasive private and official use of foreign language speech throughout the Revolutionary era, the framers of the First Amendment obviously believed that foreign language speech constituted "speech" for First Amendment purposes. Although the framers were acutely aware of the existence of foreign language speech in the public sphere – Franklin publicly lamented it[8] – they did nothing to suggest that such speech could be lawfully abridged; to the contrary, the framers associated language proscriptions with the European oppression that the American Revolution sought to vanquish. As

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[8] Franklin's remarks about "the Palatine Boors . . . swarm[ing] into our settlements, and by herding together establish[ing] their language and manners to the exclusion of ours" are well-known. *See* 4 *The Papers of Benjamin Franklin* 227 (1751) (Labaree ed. 1961).

Justice Joseph Story explained in his *Commentaries on the Constitution,*

> The next clause of the amendment respects the liberty of the press. "Congress shall make no law abridging the freedom of speech, or of the press. . . . " A little attention to the history of other countries in other ages will teach us the vast importance of this right. It is notorious, that even to this day, in some foreign countries it is a crime to speak upon any subject, religious, philosophical, or political, what is contrary to the received opinions of the government, or the institutions of the country, however laudable may be the design, and however virtuous may be the motive. . . . The Bible itself, the common inheritance, not merely of Christendom, but of the world, has been put exclusively under the control of government; and not allowed to be seen, or heard, except in a language unknown to the common inhabitants of the country. To publish a translation in the vernacular tongue, has been in former times a flagrant offense.

J. Story, *Commentaries on the Constitution of the United States* 703-705 (1833). Similarly, a leading scholar in the history of American multilingualism, Professor Shirley Heath, has noted that:

> [E]arly political leaders recognized the close connection between language and religious/cultural freedoms, and they preferred to refrain from proposing legislation which might be construed as a restriction on these freedoms.

S. Heath, "Language and Politics in the United States," in *Linguistics and Anthropology* 267, 270 (1977). These comments reflect the framers' association of language proscriptions with the religious and cultural oppression of Europe. Just as the framers rejected the idea of an established religion or a ministry of culture, they also rejected the idea of an official language and a language academy.

Id. See also S. Heath, "A National Language Academy?" Debate in the New Nation, 11 *International Journal of the Sociology of Language* 9 (1976).

Thus, the absence of language proscriptions is an element of the liberty affirmed and institutionalized by the Constitution. As Tench Coxe observed in 1787 during the debates on the ratification of the Constitution:

> To take a proper view of the ground on which we stand, it may be necessary to recollect the manner in which the United States were originally settled and established. Want of charity in the religious systems of Europe and of justice in their political governments were the principal moving causes which drove the emigrants of various countries to the American continent. The Congregationalists, Quakers, Presbyterians and other British dissenters, the Catholics of England and Ireland, the Huguenots of France, the German Lutherans, Calvinists, and Moravians, with several other societies, established themselves in the different colonies, thereby laying the ground of that catholicism in ecclesiastical affairs which has been observable since the late revolution: Religious liberty naturally promotes corresponding dispositions in matters of government.

1 *The Debate on the Constitution* 20 (B. Bailyn ed. 1993).

Article 28 is a radical repudiation of this foundational free speech tradition.

B. Polylingualism and the Fourteenth Amendment.

The linguistic tolerance of the founding era did not end with the ratification of the Constitution and the Bill of Rights. The American polylingual tradition continued unabated in the nineteenth-century and is richly illustrated by the Civil War and Reconstruction years. A brief examination of this transformative period of constitutional history is useful to appreciate the Fourteenth

Amendment's impact on the free speech rights of minority groups.

In 1855 when asked whether he was in agreement with the nativistic "Know-Nothing" party, Abraham Lincoln answered:

> How could I be? How can anyone who abhors the oppression of negroes, be in favor of degrading classes of white people? Our progress in degeneracy appears to me to be pretty rapid. As a nation, we began by declaring that *"all men are created equal."* We now practically read it, "all men are created equal, *except negroes."* When the Know-Nothings get control, it will read, "all men are created equal, except negroes, and *foreigners and catholics."* [When it comes to this] I should prefer emigrating to some country where they make no pretense of loving liberty – to Russia, for instance, where despotism can be taken pure, and without the base alloy of hypocrisy.

D. Donald, *Lincoln* 189 (1995) (emphasis in original). Subsequently, in 1861 when criticizing a proposed amendment to the Massachusetts constitution imposing a two year residency requirement on voting by naturalized citizens, Lincoln explained that:

> I have little notoriety for commiserating the oppressed condition of the negro, and I should be strangely inconsistent if I could favor any project for curtailing the existing rights of white men, even though born in different lands, and *speaking different languages* from myself.

Id. at 231 (emphasis added). Lincoln's opinions regarding equality under law were shared by his Republican colleagues. The Republican platform of 1860 contained an anti-nativist plank opposing "any state legislation by which the rights of citizens hitherto accorded to immigrants from foreign lands shall be abridged or impaired; and in favor of giving a full and efficient protection to the

rights of all classes of citizens, whether native or naturalized. . . . " E. Foner, *Free Soil, Free Labor, Free Men* 257 (1995). Thus, on the eve of the Civil War, the Republicans who would later draft the Fourteenth Amendment identified foreign language speakers as a specific class of individuals entitled to equal rights.

Republican tolerance of linguistic pluralism respected the underlying ethnic diversity of the era. "*Heterogeneous* was the only adjective that could describe the American people [on the eve of the Civil War]. . . . [B]y 1850 the American population included representatives of almost every race and language in the world." D. Donald, *Liberty and Union* 5 (1978) (emphasis in original). Ever cognizant of the importance of the foreign language vote, political candidates in the Civil War era were careful to communicate with these voters in their native tongues. In 1856, presidential candidate James Buchanan had a campaign pamphlet discussing the "free soil" controversy in the Kansas territory translated into German "for circulation in Pennsylvania's German counties." K. Stamp, *America in 1857* 159 (1990). Similarly, in his unsuccessful 1858 senatorial campaign against Stephen Douglas, Abraham Lincoln had his famous "House Divided" speech (among others) translated into German to appeal to Illinois's influential German constituency. *See* D. Donald, *Lincoln* 211, 231 (1995). Carl Schurz and Gustave Koerner also campaigned extensively in German for Lincoln in the 1860 presidential election, and several scholars have argued that German support was essential to Lincoln's success in the election. *See generally* 2 A. Faust, *The German Element in the United States* 150-187 (1927), E. Foner, *Free Soil, Free Labor, Free Men* 259 n. 71 (1995).[9]

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[9] The official polylingualism of this era of constitutional history is also illustrated by the publication of Minnesota's constitution of 1857 in English, German, Swedish, Norwegian and French, *see* J. Crawford, *Hold Your Tongue* 44 (1992),

By 1866, after Appomattox, the ratification of the Thirteenth Amendment, and the passage of the Civil Rights Act of 1866, the principle of linguistic tolerance was orthodoxy for the Republicans who drafted the Fourteenth Amendment. *See generally* E. Foner, *Reconstruction* 257 (1988). For example, Representative Thaddeus Stevens of Pennsylvania – the head of the House delegation to the Joint Committee on Reconstruction that officially reported the Fourteenth Amendment – explained that Reconstruction legislation passed pursuant to section two of the Thirteenth Amendment was designed to assure that "all laws be impartial, *without regard to language*, race or former condition." Quoted in D. Donald, *The Politics of Reconstruction, 1863-1867* 58 (1965) (emphasis added). Representative Stevens later remarked that the Fourteenth Amendment required that "the same laws must and shall apply to every mortal, American, Irishman, African, German, or Turk." Quoted in W. Nelson, *The Fourteenth Amendment* 116 (1988).

In accordance with this conception of equality – and ever mindful of their German-speaking colleagues and constituents – the Reconstruction framers refused to limit the right to vote to those citizens who could read the Constitution and write their names in English. On June 27, 1866, during the first session of the 39th Congress, Senator Lot Morrill of Maine proposed an amendment to a suffrage bill for the District of Columbia requiring English literacy, contending that:

> I believe for the sake of unity, unity in our civilization, unity in our language, unity in our

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California's constitution of 1849 in English and Spanish, Cal. Const. of 1849, and Louisiana's constitution of 1845 in English and French. *See Journal of the Proceedings of the Convention of Louisiana* 313-315 (1845).

> sentiments and opinions, that we ought to inculcate as a standard and a formula that the laws should always be printed in the English language; and so far as any [suffrage] qualification is concerned, certainly our civilization is worth but little in its influence and its effect upon aliens and foreigners, if at least we do not require them to speak our language.

Congressional Globe, 39th Cong., 1st Sess. 3433 (1866). In arguing against Senator Morrill's proposal Senator Samuel Pomeroy of Kansas stated that:

> [T]he man who becomes an American from choice, who looking over the ocean and seeing America, learning of our institutions, breathing somewhat of our freedom, longing to identify himself with us in this great struggle for self-government, comes here and voluntarily assumes the duties of a citizen, enters our Army, and carries our flag to victory; I say such a man, if he cannot write a word in English, is an American; he is a patriot; he is loyal; and he is entitled to vote.

Id. Senator (and future Vice President) Henry Wilson of Massachusetts echoed Pomeroy's views, exclaiming "why tell a German, a man of intelligence and character, that he must read the Constitution in the English language? Why say to the Frenchman, or to any foreigner who comes here, that he must be able to read and write in the English language? I think it is all wrong." *Id.* Based on these remarks, Senator Morrill withdrew his proposed amendment without further debate. *Id.*

Lastly, when considering the meaning of the Fourteenth Amendment, it is important to remember that the institution of slavery acted as a straightjacket on the First Amendment that was not removed until the outbreak of the Civil War and the passage of the Fourteenth Amendment. As Professor Akhil Amar observes:

> From the 1830s on, the abolitionist crusaders had understood that freedom of speech for all men and women went hand in hand with freedom of bodily liberty for slaves. The Slave Power posed a threat to freedom – of all kinds – and could support itself only through suppression of opposition speech, with gag rules on anti-slavery petitions, bans on "incendiary" publications, intrusions on the right of peaceable assembly, and so on.

A. Amar, *The Bill of Rights* 234-235 (1998). *See also* W. Freehling, *The Road to Disunion* 98-118, 289-352 (1990). Slavery's disabling impact on the First Amendment was the subject of frequent petitions by citizens to the 39th Congress. For example, on January 30, 1866, Senator Howard of Michigan presented a petition from "certain German naturalized citizens of the United States residing in Detroit" seeking "prohibition of all restrictions of free speech, free press, free assemblage and free instruction." *Congressional Globe*, 39th Cong., 1st Sess. 494 (1886).[10]

In light of the problem of slavery and free speech, the 39th Congress sought to abolish by means of the Fourteenth Amendment the regulations, practices and customs that stifled free speech. As Justice Bradley acknowledged in his dissenting opinion in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 123 (1873):

> The mischief to be remedied [by the Fourteenth Amendment] was not merely slavery, . . . [but also] that intoleration of free speech and free discussion which often rendered life and property insecure, and led to so much unequal legislation.

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[10] Similarly, one of first petitions received by President Lincoln urging him to immediately abolish slavery was written in German by a group of German-American citizens residing in Chicago. *See* J. Franklin, *The Emancipation Proclamation* 26 (1963).

See also, M. Curtis, *No State Shall Abridge* 32, 49-50, 56, 133-139 (1986).

The framers of the Fourteenth Amendment accomplished their free speech purposes by incorporating an equal protection component into the concept of free speech which prohibited the imposition of state restrictions on speech based on subject matter or group classification. Professor Amar explains that:

> [T]he very meaning of freedom of speech . . . was subtly redefined in the process of being incorporated [into the Fourteenth Amendment]. In the eighteenth century the paradigmatic speaker was someone like John Peter Zenger or James Callender, a relatively popular publisher saying relatively popular things critical of less popular government officials. In the mid-nineteenth century the paradigm shifted to the Unionist, the abolitionist, and the freedman, to speakers like Samuel Hoar, Harriet Beecher Stowe, and Frederick Douglass. . . .
>
> The shift from Zenger and Callender to Hoar, Stowe, and Douglass was subtle but significant. All can be seen as "outsiders," but with an important difference. As representatives of the Fourth Estate, Zenger and Callender were outside the government that tried to censor them, but Hoar, Stowe, and Douglass were outsiders in a much deeper sense. Vis-a-vis the Southern society trying to suppress their speech, Hoar, Stowe, and Douglass were geographic, cultural, and ethnic outsiders who were critical of dominant social institutions and opinions. Put this way, this shift directs us away from Madison's first concern in The Federalist No. 51 (the "agency" problem of protecting the people against unrepresentative government), toward his second concern (protecting minorities from "factional" majority tyranny). The new First/

> Fourteenth Amendment tradition is less majoritarian and more libertarian. . . .
>
> The 1866 redefinition [of free speech] changed the central purpose . . . of freedom of speech, making central certain types of speech that had previously been far more peripheral: religious speech, artistic speech, and *most importantly, minority speech.*

A. Amar, *The Bill of Rights* 237-238 (1998) (emphasis added). Thus, when seen through the lens of the Fourteenth Amendment, the principle of free speech prohibits the imposition of disparate restrictions on minority speech. As Senator Howard of Michigan stated in his famous speech presenting the final version of the Amendment to the Senate floor, "[the Fourteenth Amendment] abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another." *Congressional Globe*, 39th Cong. 1st Sess. 2766 (1866). *See also Barbier v. Connally*, 113 U.S. 27, 32 (1884) ("Class legislation, discriminating against some and favoring others, is prohibited [under the Fourteenth Amendment]").

The equal protection proscription of "class legislation" was recently illustrated by this Court's opinion in *Romer v. Evans*, 116 S. Ct. 1620, 1628 (1996):

> It is not within our constitutional tradition to enact [class-based] laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities. Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one

> group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. The guaranty of equal protection of the laws is a pledge of the protection of equal laws.

(Internal quotation marks and citations omitted.) Like the provision invalidated by this Court in *Romer v. Evans*, Article 28 "identifies persons by a single trait" (foreign language speech) and makes it "more difficult for one group of citizens than for all others to seek aid from the government." *Id.* This regime clearly discriminates based on categories of speakers and thus violates basic equal protection requirements.

In summary, as the Arizona Supreme Court concluded, Article 28 defies the equal protection component of free speech. A class of individuals – foreign language speakers – specifically identified as being within the ambit of Fourteenth Amendment protection by the framers of the Amendment is denied the right to communicate in the manner that its English-speaking counterparts freely enjoy. This is the very type of class-specific legal impediment that the Fourteenth Amendment was designed to abolish.

C. Polylingualism and the Development of Modern Free Speech Jurisprudence.

The American tradition of linguistic tolerance is reflected in the foundations of this Court's free speech jurisprudence. In the case that many scholars identify as the starting point of modern First Amendment law, *Abrams v. United States*, 250 U.S. 616, 620 (1920), the Court considered foreign language speech (Yiddish) and implicitly refused to distinguish between English and foreign language speech for First Amendment purposes. In *Abrams*, several Russian Jewish emigres challenged their convictions under the Espionage Act of 1917 as violative of their free speech rights based on the fact that the only

evidence of "espionage" consisted of the distribution of leaflets in English and Yiddish condemning America's involvement in the Russian Revolution.

Although the Court translated and considered the Yiddish leaflet in *Abrams*, both the majority opinion by Justice Clarke and the dissenting opinion by Justice Holmes treat the two languages as standing on equal footing for First Amendment purposes. Not only does Justice Holmes not suggest that foreign language speech regarding matters of public concern falls outside the scope of First Amendment protection – to the contrary – he concludes that it is virtually inviolate:

> In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had just as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them.

Abrams, 250 U.S. at 629 (1920). Moreover, by equating an individual's right to criticize the government with the government's right to print the laws, Justice Holmes' dissent reflects the theory of popular sovereignty expressly embraced by this Court forty years later in *New York Times v. Sullivan*, 376 U.S. 254, 273-277 (1963).

This Court also considered foreign language speech in the free speech context in *Frohwerk v. United States*, 249 U.S. 616 (1919), and *Schaefer v. United States*, 251 U.S. 466 (1922), both of which involved the question of whether speech published in three German-language newspapers – the *Missouri Staats Zeitung*, the *Philadelphia Tageblatt*, and the *Philadelphia Sonntagsblatt* – violated the Espionage Act of 1918. Although the Court translated the speech in question from German to English in both cases, it did not state or suggest that foreign language speech did not constitute "speech" under the First Amendment. In fact, in his dissenting opinion in *Schaefer*, Justice Brandeis argued that the majority's conclusion that Schaefer's

speech was "seditious" was based on an inaccurate translation of the original German text, which he printed alongside the English version, noting critically that "[e]vidently both the jury and the trial judge failed to examine the German original." 251 U.S. at 487, 488 (1922).[11]

This Court's implicit, but uniform refusal to discriminate against foreign language speech in this important trilogy of free speech cases was not accidental. Discrimination against the German language was both well-known and rampant during the World War I era. As Margaret Blanchard writes:

> In fact, [during the first world war] a whole subculture in American Society was virtually destroyed because of irrational fears. . . . [T]he American people were so frightened of and so enraged at anything German that almost all vestiges of that heritage were systematically eliminated in the United States. Individuals and communities with German sounding names anglicized them in order to avoid community-sponsored retribution. The German language was all but outlawed; German music could no longer be played; and sauerkraut was renamed liberty cabbage. The German-language press, which probably was the strongest of the ethnic presses at the start of the war, suffered terribly. No German newspaper was suppressed during the war, but several did lose second-class mailing privileges, or, in a few cases, all access to the

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[11] Justice Brandeis' use of German in his dissent would have violated Article 28, which expressly applies to the judiciary and requires that all government "orders" be in English and "in no other language." Ariz. Const. Art. XXVIII, §§ 1(3) and 3(1)(a).

> mail. Most of them lost subscribers and advertisers and were as permanently crippled as the community they had served.

M. Blanchard, *Revolutionary Sparks* 91 (1992). The pattern of discrimination against foreign language speech during the World War I era underscores the importance of the Court's failure to subject it to reduced protection in *Abrams*, *Frohwerk*, and *Schaefer*.

The First Amendment implications of proscriptions of foreign language speech during the World War I era were not ignored by the scholarly community. In his classic examination of free speech, *Free Speech in the United States*, Professor Zechariah Chafee rejects any distinction between English and other languages for First Amendment purposes and notes that:

> Even if it can be said the Blackstonian test [regarding prior restraints] does not forbid the government to control its own machinery, [for example,] the post-office, it is clear to every newspaper [advocating violent revolution] that its exclusion from the mails is equivalent to an absolute censorship. The same considerations apply to a censorship of the foreign language press. . . .

Z. Chafee, *Free Speech in the United States* 169 (1941). In concluding that any problems arising from foreign language speech should be resolved non-coercively, Professor Chafee argued:

> Just as the merits of free trade in goods are lessened if the normal processes of competition are checked by monopolies and dumping, so free trade in ideas requires that the barriers to the interchange of argument presented by illiteracy and foreign languages shall somehow be broken down. Aliens cannot be forced to love this country. They will love it rather because it does not employ force except against obviously wrongful overt acts. They will love it as the

> home of wise tolerance, of confidence in its own strength and freedom.

Id. at 240. These remarks reflect the principle of tolerance which predicates free speech jurisprudence. *See generally*, L. Bollinger, *The Tolerant Society* (1986). As this Court acknowledged in *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923):

> That the State may do much, go very far indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages, as well as to those born with English on their tongue. Perhaps it would be highly advantageous if all had a ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution – a desirable end cannot be promoted by prohibited means.

See also Bartels v. Iowa, 262 U.S. 404 (1923), *Nebraska District of Evangelical Lutheran Synod v. McKelvie*, 262 U.S. 404, 410 (1923), *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926), and *Farrington v. Tokushige*, 273 U.S. 284 (1927) (all invalidating foreign language proscriptions as unconstitutional).[12]

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[12] Although *Meyer* and its progeny were decided under the due process and equal protection clauses of the Fourteenth Amendment, the decisions have important free speech implications. Justice Brandeis – who joined the majority opinion in *Meyer* without separate comment – later indicated to Felix Frankfurter that he based his decision on the "right to . . . utter speech." M. Urofsky, "The Brandeis-Frankfurter Conversations," 1985 Sup. Ct. Rev. 299, 320. Professor Chafee also analyzed *Meyer* under the rubric of free speech. *See* Z. Chafee, *Free Speech in the United States* 552 (1941). This Court has also characterized *Meyer* as a First Amendment case. *See Griswold v. Connecticut*, 381 U.S. 475, 482 (1965).

Whether considered under the First or Fourteenth Amendments, *Meyer* and its progeny collectively teach that language proscriptions suppress free speech. As this Court observed in a substantively similar context:

> We cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expressing of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results.

Cohen v. California, 403 U.S. 15, 24 (1971). If the state cannot lawfully proscribe the display of profanity in the courthouse, *a fortiori* it cannot prohibit the non-disruptive use of foreign languages in the statehouse. Elected officials must maintain the right to communicate with the public by means of the most effective tools available.

D. "Government Speech" and the Free Speech Rights of Elected Officials.

The free speech rights of elected officials are fundamental to representative government under the Constitution. These rights predated the free speech rights of members of the public at large in Anglo-American jurisprudence and served as the conceptual model for the public right of "the freedom of speech" guaranteed by the First Amendment. As Leonard Levy explains:

> The phrase "freedom of speech" originated in Anglo-American history during the struggle of Parliament to achieve the privilege of free debate. . . . Until the last quarter of the eighteenth century, freedom of speech referred not to a civil right but primarily to a parliamentary

> right: the legislator's immunity from punishment for anything said by him in his official capacity during a legislative session.

L. Levy, *The Emergence of a Free Press* 3 (1983). *See also* Z. Chafee, *Free Speech in the United States* 552 (1941) ("The earliest form of freedom of speech secured by the English Parliament was the immunity of its members from responsibility to the King or in the courts for what they said in debates").

The American Revolution transformed the parliamentary privilege into "the freedom of speech" recognized by the First Amendment. *See generally* L. Levy, *The Emergence of a Free Press* 309-322 (1985). The framers of the Constitution believed that the legitimacy of government rested on the "consent of the governed." As James Madison observed when arguing the unconstitutionality of the Alien and Sedition Acts, under the Constitution "[t]he people, not the government, possess absolute sovereignty." 4 *Elliot's Debates on the Adoption of the Federal Constitution* 569-570 (1845). Thus, although historically "the freedom of speech" derived from and reflected the free speech rights of elected officials, this pattern was reversed by the American theory of popular sovereignty under which the free speech rights of elected officials derive from and reflect the free speech rights of the people at large. *See* A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* 36 (1960).

When the people elected representatives to accomplish their collective purposes in government, the speech and debate of those representatives were to reflect the speech and debate of the people whom they represented. Jack Rakove observes that:

> If one maxim reflected Americans' ideas of representation . . . it was the belief that a representative assembly "should be in miniature an exact portrait of the people at large. It should think, feel, reason and act like them."

J. Rakove, *Original Meanings* 203 (1996), quoting J. Adams, *Thoughts on Government* (1776). This definition of representation enjoyed a consensus at the Constitutional Convention. James Wilson declared that "[t]he Legislature ought to be the most exact transcript of the whole society." *Id.* George Mason proceeded to give what Edmund Morgan describes as "the standard American meaning of representation":

> The requisites in actual representation are that the Representatives should sympathize with their constituents; should think, as they think and feel as they feel . . . so much so, that even the diseases of the people should be represented – if not, how are they to be cured?

Quoted in E. Morgan, *Inventing the People* 272 (1988). This theory of representation provided the "consent" that defined republican government under the Constitution. As Professor Bailyn explains:

> Where government was such an accurate mirror of the people, sensitively reflecting their desires and feelings, consent was a continuous, everyday process. In effect the people were present through their representatives, and were themselves, step by step and point by point, acting in the conduct of public affairs. No longer merely an ultimate check on government, they were in some sense the government. Government had no separate existence apart from them; it was by the people as well as for the people; it gained its authority from their continuous consent.

B. Bailyn, *The Ideological Origins of the American Revolution* 173 (1967). Of course, this theory of consensual representation was contingent upon the ability of the elected to freely converse with their electors, in English or any other tongue.

Although the principle of freedom of speech inhered in the original constitutional structure based on the doctrine of popular sovereignty, it found its richest textual

expression in the First Amendment. The Amendment "sounds in structure and focuses . . . on the representational linkage between Congress and its constituents." A. Amar, *The Bill of Rights* 20 (1998). The Amendment (among other things) protects the deliberative process attendant to representative democracy. *See generally* A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (1960). As this Court stated in *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964):

> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes by the people. The maintenance of the opportunity for free political discussion to the end that government be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. . . . The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selections. To many this is, and always will be, folly; but we have staked upon it our all."

(Citations and internal quotation marks omitted.)

The application of these free speech principles to elected officials is illustrated by this Court's unanimous opinion in *Bond v. Floyd*, 385 U.S. 116 (1966). In *Bond* the Court considered a First Amendment challenge to the Georgia House of Representatives' refusal to seat Julian Bond upon his lawful election to office based on his public criticism of the Vietnam War. In invalidating the Georgia House's exclusion of Mr. Bond, the Court stated

that the First Amendment requires that elected officials "be given the *widest* latitude to express their views of policy" and that elected officials were entitled to as much protection under the First Amendment as members of the public at large. *Id.* at 136 (emphasis added.) This "wide latitude" necessarily includes the right of elected officials to choose the language by which to communicate with their constituents. This is especially true when some of those constituents are unable to communicate effectively in English.

Bond v. Floyd also illustrates the error of petitioners' contention that Article 28 is justified by "[t]he government's rights to control its own speech." *Petition* 15. This contention is erroneous because it is based on a false assumption that "the government" established by the Constitution is monolithic. In fact, based on the separation of powers, federalism, and multi-member legislatures, government is intentionally fragmented under our constitutional system. Thus, as *Bond v. Floyd* illustrates, the "government" cannot violate the free speech rights of any constituent part of government.

Accordingly, petitioners' assertions regarding government speech are predicated on a theory of sovereignty that is antithetical to the American Constitutional tradition.

E. This case does not involve circumstances worthy of certiorari.

The resolution of this case was contingent on a uniquely restrictive state enactment which was authoritatively construed by the State's highest tribunal and which the State itself has elected not to defend. Although this case is important to the parties to this proceeding, the Arizona Supreme Court's judgment resolving the case does not establish rules of general applicability to our nation's legal system. Instead, the Arizona Supreme Court's decision reflects six years of painstaking efforts

by a state court system to apply well-settled constitutional principles to a peculiar and complicated set of facts impacting a single locality. Reflecting the unusual nature of both the language of Article 28 and the underlying material facts, no inconsistency with the precedents of this Court has been shown.

Given the fact that (at least) twenty two other states have enacted laws declaring English as their official language, if this issue is really as worthy of certiorari as the petitioners claim, other courts will consider the issue and provide this Court with a more complete record by which to consider the question. The absence of any litigation on this issue arising outside of Arizona when such laws have been on the books for years demonstrates the unique nature of Article 28 and its purely local impact. The petition merely seeks reversal of a narrowly tailored state court decision adverse only to petitioners and is thus inappropriate for certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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